BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaint by Eleanor Iness dated May 15, 1995 alleging discrimination in accommodation on the basis of receipt of public assistance by Caroline Co-operative Homes Inc.;

B E T W E E N:

Ontario Human Rights Commission

-and-

Eleanor Iness

Complainant

-and-

Caroline Co-operative Homes Inc.
and Canada Mortgage and Housing Corporation

Respondents

INTERIM DECISION

Adjudicator: Steven Faughnan

Date: November 29, 2001

Board File No.: BI-320-00

Decision No.: 01-028-I

Board of Inquiry *(Human Rights Code)*
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ISSUES

This interim decision deals with a motion by the Respondent Canada Mortgage and Housing Corporation ("CMHC") for a stay of an interim decision in this matter dated June 13, 2001, whereby CMHC was made a party to the Complaint of Eleanor Iness (the "Interim Decision") and a stay, or in the alternative, an adjournment of the proceedings before the Board of Inquiry (the "Board") until after the judicial review application is heard and adjudicated by the Divisional Court.

THE DECISION

CMHC's motion for a stay is denied. CMHC's motion for an adjournment is allowed. This proceeding is adjourned to April 11, 2002 for a conference call hearing to take place at 8:30 a.m. that day, on the conditions set out in the order that follows. At this conference call the parties will advise the Board of the status of the judicial review application and whether a further adjournment is necessary.

THE FACTS

On June 13, 2001, the Board released its Interim Decision holding that CMHC is a proper party to the Complaint and that it has jurisdiction to add it as a party. After the Interim Decision was released the Board received correspondence from the parties that raised a number of procedural issues, including a request by CMHC for a stay of proceedings pending the determination of a judicial review of the Interim Decision.

The Board then released an interim decision dated July 13, 2001, to clarify the procedural steps to be taken by the parties in this matter with respect to CMHC's request for a stay. Amongst other things, the Board confirmed in the interim decision that the parties were previously advised by letter dated July 5, 2001, that "CMHC's response need not be filed until after a determination of

whether or not a stay will be granted." As of the date of the interim decision dated July 13, 2001, both the Ontario Human Rights Commission ("Commission") and the Respondent, Caroline Co-operative Homes Inc. ("Caroline"), consented to CMHC's request for a stay pending the determination of CMHC's intended judicial review application. At that point in time, Eleanor Iness (the "Complainant") was in opposition to the request.

The July 13, 2001, interim decision set out the time frame for the delivery of written submissions, which was subsequently extended by the Board. Vice-Chair McKellar also set out that, in their submissions on the stay request, the parties would be expected to address the Board's previous decisions in *Fiorini v. Di Poce Management Ltd.*, [1997] O.H.R.B.I.D. No. 4, and *Moffat v. Oswin and Kinark Child and Family Services*, (BI 0056-95) (unreported decision dated December 13, 1995). The Board received written submissions from the Commission dated August 2, 2001 and CMHC dated August 8, 2001. Although the Board had forwarded correspondence to the parties requesting a date for a pre-hearing conference call, by letter dated August 17, 2001, the Board advised that a pre-hearing conference call in the matter would not be necessary until a decision was rendered on this motion.

The Complainant's position with respect to the stay changed. In a letter that the Complainant's counsel forwarded to the Board dated August 17, 2001, she explained why. In the letter Complainant's counsel advised the Board that she had received a judicial review application dated August 8, 2001 from CMHC and now understood from their written submissions that CMHC undertakes to perfect the judicial review application within the 30 day time line set out in the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended (the "Rules of Civil Procedure"). In light of the fact that the process had now commenced and CMHC has undertaken to comply with the said time-lines, she advises that the Complainant now consents to a stay pending the decision of the Divisional Court in respect of the judicial review application.

However, notwithstanding the undertaking given by CMHC to perfect the judicial review

application within the 30-day time line set out in the Rules of Civil Procedure, the judicial review application was perfected only recently. To date there is no evidence before the Board that a date has been obtained for the hearing of the judicial review application.

THE PARTIES' POSITIONS

CMHC submits that the addition of CMHC raises a complex constitutional issue. As summarized at paragraph 8 of its written submissions, CMHC submits that the facts of this case warrant a stay for the following reasons:

a) The facts do not appear to be in dispute and are well documented. What appears to be in issue in the Complaint is the policy of CMHC, a public body, and Caroline, and how that policy allegedly impacted upon the Complainant. As such this is not the case where a delay of any kind might have an impact on the fading memories of potential witnesses;

b) The constitutional issue under review to the Divisional Court is a substantive one, that goes directly to the jurisdiction of the Board to hear a matter involving the CMHC, when CMHC is acting within its core federal powers;

c) The constitutional issue under review to the Divisional Court involves a complex constitutional argument that will involve extensive preparation and which requires determination before the parties expend further time, effort and costs on the Board proceedings; and

d) Forcing the parties to continue with a hearing without knowing for certain who all the parties are adds to the expenses of not only CMHC who has to participate in a proceeding in which it may not legally be bound to do so, but to all parties. The addition of CMHC makes this hearing a very complex one beyond the scope of the Complaint before the

Board. It may involve analysis of Federal procedures, legislation and policies in co-operatives, and other similar assisted housing programs, across the country. This complexity then increases the time required for the pre-hearing procedures and for the hearing itself. If the Board refuses to grant a stay, and the Divisional Court then decides that the Board did not have jurisdiction to add CMHC as a party to this matter then all parties (sic), including the resources of the Board and the public funds of CMHC, will have been wasted. These costs may have been thrown away, and may not be recoverable by any party; and

e) In any event, the stay will be temporary in nature and will only slightly delay the hearings (if at all).

In support of its submissions CMHC relied on *Brillinger v. Brockie*, [1999] O.H.R.B.I.D. No. 6 (Ont. Bd. Inq.) and *Moffat*.

CMHC submits that just as in *Brillinger*, the addition of CMHC as a Respondent is a serious issue to be tried involving complex jurisdictional and constitutional arguments. CMHC submits that it would suffer irreparable harm if it were added by being forced to participate in a proceeding which it may not ultimately be obliged to participate in, and if the matter is not stayed, may be subject to rulings that may impact the policy and practice of CMHC and the Federal government prior to the conclusion of the application for judicial review. CMHC submits that the potentially unnecessary expenditure of public funds to defend this claim, which funds they state they would not be able to recover, amounts to irreparable harm.

CMHC submits that if the hearing continues it will be on a broader basis than a case that is solely brought against Caroline, which CMHC submits involves broader legal issues than originally contemplated by the Complaint.

CMHC submits that the balance of convenience favours granting a stay because of the expenses which will be incurred and not recovered by all parties, including CMHC, and that if CMHC is successful, the remaining parties may have a right to a new hearing themselves, which will involve duplication of efforts and costs and the entire matter being reheard.

In the alternative to a stay, the CMHC submits that it is prepared to agree to scheduled dates for the Board hearing to allow it time to perfect and expedite the judicial review application. In this regard CMHC provided the undertaking set out above. CMHC suggests that if the Board chooses the adjournment option, the hearing dates could be scheduled to take place shortly after the Divisional Court judicial review hearing.

The Commission also submits that the question whether the CMHC is subject to the jurisdiction of the Board is a substantial question to be tried, and that granting a stay should be decided on a balance of convenience.

The Commission submits that the balance of convenience favours granting a stay for the following reasons:

(a) The essential facts are not in dispute. Delay will not prevent a fair hearing. This is not a case in which the fading of memories by the passage of time is an issue.

(b) If any party or proposed party is prejudice by the delay, it is CMHC – the very entity requesting a stay.

(c) In *Fiorini*, there was going to be a hearing involving all the parties in any event; the only issue was whether there was going to be a transcript. By contrast, in this case, the very question raised by the proposed application for judicial review is whether there will be a hearing involving CMHC as a party.

(d) Forcing CMHC to proceed with a hearing, with the possibility that the Divisional Court subsequently decides that the Board has no jurisdiction over CMHC, is at best cumbersome. It would be more efficient to determine who the parties are (with certainty) at the commencement of a hearing, rather than after a hearing.

(e) It is questionable whether the prejudice to CMHC (if it participated in a hearing and were subsequently successful on its application) would be fully compensable by an order of costs made by the Divisional Court. While the Divisional Court clearly has jurisdiction to order the Board to pay CMHC's costs of an application for judicial review, its authority to order the Board to also pay CMHC's costs "thrown away" at the hearing before the Board is not as clear.

(f) The involvement of CMHC as a party will increase the expenses of all other parties to the hearing. Those expenses will be "thrown away" in the event that a court subsequently decides that CMHC should not have been a party.

The Commission further submits that if the Board wishes to make orders with respect to pre-hearing matters the Commission suggests that the proper approach is to adjourn the hearing of evidence sine die or set a hearing date sufficiently far in the future to allow the Divisional Court to decide the jurisdictional issue. If the hearing of evidence is adjourned sine die pending judicial review, the Board could continue to make orders with respect to such things as delivery of pleadings. Alternatively, setting dates far enough in the future to allow the judicial review application to be heard prior to the time scheduled for the evidence, would allow CMHC to avoid incurring the costs of the hearing of evidence pending a judicial review application, while permitting the Board to complete its pre-hearing stages so that the hearing of evidence commences as quickly as possible.

ANALYSIS

In keeping with section 25 of the *Statutory Powers Procedure Act*, R.S.O. 1990 c.S.22, as amended, (the "*SPPA*"), Rule 73 of the Board of Inquiry Rules of Practice (the "Rules of Practice") provides that an application for judicial review does not operate as a stay of a decision of the Board unless the Board or a Court rules otherwise. In accordance with section 21 of the *SPPA* and Rule 63 of the Rules of Practice, the Board may adjourn a hearing on its own motion, or where it is required to permit a fair and adequate hearing to be held. Rule 65 of the Rules of Practice allows a panel to impose conditions upon an adjournment request.

The fact that all the parties consent to a stay or an adjournment, although the terms of the Complainant's consent in this case may not have been strictly satisfied, does not relieve the Board of ensuring that a stay or adjournment is appropriate in all the circumstances. There is no automatic stay of the Board's proceedings when a judicial review application is made. A stay is an extraordinary remedy. If a stay is granted the Board essentially abdicates control over its process and must await the results of a potentially lengthy appeal process. Whether proceedings are stayed or adjourned is a discretionary matter.

In *Moffat*, Vice-Chair McKellar, dealt with a request to adjourn the proceedings while the Complainant pursued a judicial review application. In distilling the results of the review of the law in that decision she adopted the following principles, subject to one qualification (see *Moffat*, supra at paragraph 12):

(a) Administrative tribunals are designed to provide for the expeditious resolution of disputes. Delays or interruptions to that process are to be avoided.

(b) Such delays or interruptions occasioned by judicial review proceedings should be avoided except in "exceptional circumstances".

(c) The mere fact that a matter is jurisdictional in nature does not constitute an exceptional circumstance, not does it alleviate the need for a "factual grounding", without which the reviewing court cannot properly assess the jurisdictional issue.

(d) In determining whether exceptional circumstances exist such that an adjournment should be granted, the Board should consider whether the issue grounding the judicial review application is a substantial one worthy of judicial deliberation, and in so doing the Board should assess the strengths or weaknesses of the case for judicial review.

(e) If the issue is a substantial one, the question of whether to grant an adjournment should then be decided on the basis of the balance of convenience.

The only caveat that was given was that the "substantial" nature of the issue for judicial deliberation can be measured not just by assessing the strength or weakness of the judicial review application, but also by having regard to such factors as whether it relates to a "settled" or "novel" area of the law. (See *Moffat*, supra at paragraph 14). Although the Board was advised that many of the important findings in that case would be resolved on issues of credibility, for the reasons set out in the decision, an adjournment of the proceedings was granted on certain terms.

In *Fiorini*, it was the Respondents who requested a stay of proceedings pending a judicial review application. In that case Vice-Chair McKellar applied the balance of convenience test to determine whether a stay would be granted. She determined that the party requesting a stay must clearly demonstrate that the balance of convenience overwhelmingly favours the granting of it. In *Fiorini*, amongst other things, the Board was concerned about the delay that had taken place and that the interest that the Respondents asserted in that judicial review application could be protected if they engaged a court reporter to transcribe the hearing. The stay was refused.

In *Brillinger*, then Chair MacNaughton adopted a three-part test for a stay or an adjournment (my emphasis) pending a judicial review application, which was based on a test for the granting of an

interlocutory injunction. As stated in the decision she held that those three factors require the applicant seeking the stay or adjournment to:

(a) demonstrate that there is a serious issue to be tried;
(b) convince the Board that it will suffer irreparable harm if the relief is not granted. Irreparable harm is harm which either cannot be quantified in monetary terms or is uncollectable; and
(c) persuade that the balance of convenience favours the granting of the stay or adjournment.

The factors considered by the panels of the Board in granting an adjournment in *Moffat* and in granting a stay in *Brillinger* do share some common elements. This panel of the Board agrees that *Brillinger* sets out the proper test to apply for the granting of a stay pending a judicial review application, however, this panel of the Board is not prepared to agree with the panel in *Brillinger* that the same standard should be set for a stay and an adjournment when a judicial review application is brought. As set out above, if a stay is granted the Board relinquishes control over its process. An adjournment, if granted on certain terms, does not result in a panel of the Board losing control of the matter or of the setting of time limits. Furthermore, in setting the same standard for both a stay and an adjournment, the flexibility of the Board to fashion an appropriate response to different procedural exigencies is adversely affected. For these reasons the Board prefers to apply the test set out in *Moffat* to a request for an adjournment pending a judicial review application. The Board now turns to a consideration of the appropriate factors in both tests.

The jurisdictional question in this case is not a frivolous one. I am satisfied that, in all the circumstances, the jurisdictional issue is a serious issue or question to be tried and is of a substantial nature.

The issue of whether the Respondent CMHC will suffer irreparable harm if the matter is not

stayed is less clear. The irreparable harm that CMHC complains of is more in the nature of inconvenience and expense. As set out in *Brillinger*, irreparable harm is harm that either cannot be quantified in monetary terms or is uncollectable. While CMHC may suffer some prejudice by way of inconvenience and expense if a stay is refused, I am not satisfied, based on the submissions made, that CMHC will suffer irreparable harm if a stay is not granted.

On this basis then, a stay is not an appropriate remedy. However, following the analysis of the panel of the Board in *Moffat*, because this panel of the Board has determined that the jurisdictional issue is a serious issue or question to be tried and is of a substantial nature, an analysis of the balance of convenience should take place to determine whether an adjournment should be granted to permit a fair and adequate hearing to be held. In considering the balance of convenience the Board must consider whether the potential harm to CMHC if an adjournment is not granted outweighs the potential harm to the other parties and to the public interest. The Board should also consider if any of the parties would be unduly prejudiced by an adjournment.

Although the consent of the parties does not relieve the Board of the obligation to consider the appropriateness of an adjournment, it cannot be ignored. By agreeing to a stay the parties acknowledged themselves that the balance of convenience favours CMHC. It would appear that if an adjournment is not granted, of all the parties, CMHC may suffer the most prejudice as a result of its potentially unnecessary expenditure of time and money in defending the complaint.

The essential facts in this case are not in dispute. Absent further evidence, this does not appear to be a case where delay will prevent a fair hearing. Forcing the parties to continue with a hearing with the possibility that the Divisional Court subsequently decides that the Board has no jurisdiction over CMHC, is potentially cumbersome. If the matter proceeds and the jurisdictional issue is resolved in favour of CMHC, time and resources of the parties and the Board may have been needlessly expended. While the Board must consider the public interest in an efficient and expeditious resolution of matters before the Board and in supporting the Board as the venue for the

resolution of Human Rights complaints under the *Human Rights Code*, R.S.O. 1990, c. H.19, as amended, the matter involves an entity that is publicly funded and while that fact alone is not determinative, if additional expenditures can be avoided, provided that the issue can be resolved in a timely fashion, the public may be better served by a resolution of the jurisdictional issue now, rather than later. There have been no dates set for the hearing on the merits, unlike many of the cases in which the Board has refused a request for a stay or adjournment. The hearing of this Complaint, unlike others, is still at a preliminary stage.

I have considered the matter in its entirety and I find that this is one of an exceptional nature. I am satisfied that the balance of convenience at this time appears to favour granting an adjournment to allow a fair and adequate hearing to be held. The factors that I have considered above may change with the passage of time. For example, CMHC may not move with appropriate dispatch to obtain a hearing date or the parties other than CMHC may decide that they wish the matter to proceed at the Board, notwithstanding the judicial review application, and present compelling reasons for me to reconsider.

For this reason while I am not satisfied at this time that a stay is an appropriate remedy, I am content to grant an adjournment of the hearing of this Complaint to April 11, 2002, for a hearing to take place by conference call that day and, for the time being, to relieve CMHC from the requirement of delivering a response subject to the following conditions. At the conference call on April 11, 2002 the parties will advise the Board of the status of the judicial review application and whether a further adjournment is necessary. I expect CMHC to obtain as early a date as possible for the hearing of the judicial review application and the other parties are to assist CMHC in that regard. I direct the parties to advise me in writing as soon as practicable of the date for the judicial review application. If any of the parties is of the view that there has been a change of circumstances that would alter my determination that an adjournment is merited, those issues may be raised at the conference call on April 11, 2002 or at an earlier date by written Notice of Motion pursuant to the Board's Rules of Practice.

ORDER

1. The hearing of this Complaint shall be adjourned to a conference call hearing to take place on April 11, 2002 at 8:30 a.m. At this conference call the parties will advise the Board of the status of the judicial review application and whether a further adjournment is necessary.

2. The Order set out in paragraph 1 is subject to the following additional conditions:

   a. CMHC is to obtain as early a date as possible for the hearing of the judicial review application and the other parties are to assist CMHC in that regard;

   b. The parties are to advise the Board in writing as soon as practicable of the date for the judicial review application;

   c. If any of the parties is of the view that there has been a change of circumstances that would alter my determination that an adjournment is merited, those issues may be raised at the conference call on April 11, 2002, or at an earlier date by written Notice of Motion pursuant to the Board's Rules of Practice.

Dated at Toronto, this 29th day of November, 2001

Steven Faughnan
Vice-Chair